15-974(L)

17-2126(CON)

To Be Argued By:
BENJAMIN H. TORRANCE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 15-974(L), 17-2126(CON)

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., OPEN SOCIETY INSTITUTE, PATHFINDER INTERNATIONAL, GLOBAL HEALTH COUNCIL, INTERACTION,

Plaintiffs-Appellees,

—v.—

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLANTS

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UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, WADE WARREN, in his official capacity as Acting Administrator of the United States Agency for International Development, BRENDA FITZGERALD, in her official capacity as Director of the U.S. Centers for Disease Control and Prevention, and her successors, THOMAS E. PRICE, in his official capacity as Secretary of the U.S. Department of Health and Human Services, and his successors, UNITED STATES CENTERS FOR DISEASE CONTROL AND PREVENTION, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants.

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Plaintiffs-Appellees,

—v.—

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, WADE WARREN, IN HIS OFFICIAL CAPACITY AS ACTING ADMINISTRATOR OF THE UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, BRENDA FITZGERALD, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, AND HER SUCCESSORS, THOMAS E. PRICE, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND HIS SUCCESSORS, UNITED STATES CENTERS FOR DISEASE CONTROL AND PREVENTION, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants.[1]

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[1] As provided by Fed. R. App. P. 43(c), the public officers named in this caption have been automatically substituted for their predecessors.

BRIEF FOR DEFENDANTS-APPELLANTS

Preliminary Statement

A provision of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (the "Leadership Act") specifies that to be eligible to receive certain federal funding, an organization must "have a policy explicitly opposing prostitution and sex trafficking." Congress imposed that funding condition after determining that the practices of prostitution and sex trafficking undermine its goal of eradicating HIV/AIDS. However, in 2013 the Supreme Court held it would violate the First Amendment to apply that funding condition to U.S.-based organizations. Thus, plaintiffs in this case, who are U.S.-based organizations, face no restrictions on their expression due to the funding condition; they may disregard the policy requirement and use their own funds to speak or act as they wish on prostitution and sex trafficking, with no repercussions for their federal funding.

But the U.S. government agencies that administer the relevant funding have continuously applied the policy requirement to foreign organizations abroad, as those organizations are not protected by the First Amendment. Plaintiffs do not deny that foreign organizations have no First Amendment rights to assert. Instead, they claim that it violates their own First Amendment rights, as U.S.-based organizations, to en-

force the policy requirement against their foreign affiliates that receive federal funding. The district court accepted that argument and enjoined the agencies from applying the policy requirement to plaintiffs' foreign affiliates.

That was error. Foreign organizations operating abroad do not enjoy First Amendment rights, whether or not they affiliate with U.S.-based organizations. In particular, they lack the First Amendment rights that were the basis for the Supreme Court's ruling that the policy requirement may not be applied to domestic entities. Neither plaintiffs nor the district court have contested that point—but the effect of the district court's ruling is to extend the protection of the First Amendment to foreign entities abroad, contradicting decades of case law. Moreover, this Court and another court of appeals have considered and rejected essentially the same claim plaintiffs now assert—that a restriction on a foreign entity infringes the First Amendment rights of a U.S. entity by impairing the links between them—holding instead that the effect on domestic entities' rights is merely incidental and therefore not a constitutional violation.

The same is true here. Plaintiffs' own constitutional rights of expression are unaffected by the policy requirement, which is applied solely to foreign organizations in the wake of the Supreme Court's decision. Plaintiffs are free to express any views regarding prostitution and sex trafficking, and are free to affiliate with foreign entities, while still receiving federal funds. But plaintiffs may not export their First

Amendment rights to foreign organizations simply because they are affiliated with them, no matter how close they claim that affiliation to be. While plaintiffs assert that the Supreme Court's previous decision forbids applying the policy requirement to any foreign entity that is "clearly identified" with a U.S.-based organization, that argument rests on a misreading of the Court's ruling, which did not address foreign entities and did not extend the First Amendment beyond the nation's borders. The district court's injunction should therefore be reversed.

Jurisdictional Statement

The district court had subject matter jurisdiction over this action under 28 U.S.C. § 1331, as plaintiffs' claims arise under the Constitution and laws of the United States. The district court entered an injunctive order on January 30, 2015 (Special Appendix ("SPA") 1–16), and the government filed a timely notice of appeal on March 30, 2015, in number 15-974 (Joint Appendix ("JA") 2064). The district court denied the government's motion for reconsideration and clarification on June 6, 2017 (SPA 17–30), thus refusing to dissolve or modify its prior injunction, and the government filed a timely notice of appeal from that order on July 10, 2017, in number 17-2126 (JA 2065). The two appeals were consolidated by this Court, and the Court has jurisdiction to review the district court's injunction and its subsequent order refusing to modify the injunction under 28 U.S.C. § 1292(a).

Questions Presented

1. A provision of the Leadership Act, 22 U.S.C. § 7631(f), requires recipients of certain federal funding to "have a policy explicitly opposing prostitution and sex trafficking." In 2013, the Supreme Court held in this case that the provision violates the First Amendment as applied to U.S.-based organizations. The question presented is whether the First Amendment permits application of § 7631(f) to foreign organizations operating abroad that are affiliated with U.S.-based organizations.

2. Whether the district court's orders granting, then later refusing to modify, an injunction against "applying the Policy Requirement to Plaintiffs or their domestic and foreign affiliates" violate Federal Rule of Civil Procedure 65 due to the injunction's lack of specificity and clarity.

Statement of the Case

A. Procedural History

Two of the current plaintiffs, both U.S.-based nongovernmental organizations that receive funding under the Act, filed this action in 2005, claiming that § 7631(f) violates the First Amendment. The district court granted a preliminary injunction to those two organizations. 430 F. Supp. 2d 222 (S.D.N.Y. 2006). The government appealed, but while the appeal was pending, the agencies that administer the relevant funding issued guidance that set forth criteria by which a funding recipient could affiliate with another organization that did not comply with the policy condition, and still

maintain sufficient independence that it would not risk its funding. This Court remanded for consideration of the agencies' guidance. 2007 WL 3334335 (2d Cir. Nov. 8, 2007).

On remand, the district court held that the guidance did not cure the First Amendment problem, and entered a preliminary injunction in favor of the original plaintiffs and two impleaded associations of U.S.-based non-governmental organizations. 570 F. Supp. 2d 533 (S.D.N.Y. 2008). The government thus ceased enforcement against all domestic funding recipients, but "the Agencies have applied the Policy Requirement to foreign organizations since its inception, without challenge." 651 F.3d 218, 238 (2d Cir. 2011).

In 2011, this Court affirmed the district court's preliminary injunction. 651 F.3d 218, 230 (2d Cir. 2011), *rhg. en banc denied*, 678 F.3d 127 (2d Cir. 2012). As described in greater detail below, the Supreme Court affirmed this Court's decision in 2013. *Agency for International Development v. Alliance for Open Society International, Inc.* ("*AOSI*"), 133 S. Ct. 2321 (2013). The government agencies then continued their practice, confirmed by formal notices, of enforcing the policy requirement only against foreign, not U.S.-based, organizations.

Plaintiffs then returned to the district court to seek a permanent injunction against the application of the policy requirement to their foreign affiliates. (JA 13–14). Without a motion for an injunction being filed, and without giving the government an opportunity to file an opposition memorandum, the district court on January 30, 2015, granted a permanent injunction to

plaintiffs. 106 F. Supp. 3d 355 (S.D.N.Y. 2015) (SPA 1–16). The government appealed that order (No. 15-974), and with the parties' consent the district court stayed its effect throughout 2015 and 2016 to permit the parties to explore resolution of the matter.

The government moved in January 2017 for reconsideration and clarification of the January 2015 injunction. (JA 17). On June 6, 2017, the district court denied the government's motion and lifted the stay. (SPA 17–30). The government again appealed (No. 17-2126), and sought a stay of the injunction from this Court. (No. 15-974, ECF Doc. 129). By order of July 25, 2017, the Court stayed the district court's injunction "insofar as it enjoins Appellants from enforcing 22 U.S.C. § 7631(f) against foreign nongovernmental organizations, including Appellees' foreign affiliates." (JA 18; No. 15-974, ECF Doc. 161).

B. The Leadership Act

1. Congress's Statements and Findings Regarding Prostitution and Trafficking

The Leadership Act was enacted to address the global epidemic of HIV/AIDS. 22 U.S.C. § 7601. Congress recognized that HIV/AIDS is a humanitarian crisis, with devastating consequences for poor and developing countries, and that it poses a serious international security threat by increasing economic and political instability and decreasing the capacity to respond to crises and resolve conflicts. 22 U.S.C. § 7601(3)(A), (4)–(10); *AOSI*, 133 S. Ct. at 2325. Through the Leadership Act and other measures, Congress has authorized and appropriated tens of billions

of dollars to combat the epidemic. *E.g.*, 22 U.S.C. § 7671 (2003 & 2008 versions); 133 S. Ct. at 2325.

Congress expressly made "the reduction of HIV/AIDS behavioral risks" a "priority of all prevention efforts in terms of funding, educational messages, and activities" and endorsed "eradicating prostitution, the sex trade . . . and sexual exploitation of women and children." 22 U.S.C. § 7611(a)(4) (2006) (amended in 2008); *accord* 22 U.S.C. § 7611(a)(12)(F), (H), (J) (requiring "reduction of HIV/AIDS behavioral risks [to be] a priority of all prevention efforts," and emphasizing "risks of procuring sex commercially," "the need to end violent behavior toward women and girls," and the importance of "eliminat[ing] . . . sexual exploitation of women and children").

Congress expressly found that "[t]he sex industry, the trafficking of individuals into such industry, and sexual violence" are "causes of and factors in the spread of the HIV/AIDS epidemic." 22 U.S.C. § 7601(23). Congressional hearings showed both the high incidence of HIV among prostitutes and that the existence of prostitution fuels the demand for trafficking of women and children. S. Hrg. 108-105, Hearing Before Subcommittee on East Asian and Pacific Affairs of Senate Committee on Foreign Relations, at 18–19 (Apr. 9, 2003) (testimony of J. Miller, State Department) ("[T]here wouldn't be sex trafficking without prostitution.").

Moreover, in hearings on international slavery and sex trafficking held contemporaneously with consideration of the Leadership Act, Congress learned that hundreds of thousands of women and girls had been

trafficked to countries where they were "beaten, raped, [and] infected with HIV/AIDS so that organized crime" could profit, and that young children were being "targeted as sexual partners in order to reduce the risk of contracting HIV/AIDS" or raped by those "who believe that sex with a virgin will cure them from HIV/AIDS." S. Hrg. 108-105, at 4 (testimony of J. Miller); H.R. Hrg. 108-137, Hearing Before Subcommittee on Human Rights and Wellness, House Committee on Government Reform, at 96 (Oct. 29, 2003) (testimony of M. Mattar).

Accordingly, Congress unambiguously called for the elimination of prostitution and sex trafficking as part of the United States' fight against HIV/AIDS: "Prostitution and other sexual victimization are degrading to women and children and it should be the policy of the United States to eradicate such practices." 22 U.S.C. § 7601(23).

In light of its findings on the links between prostitution, sex trafficking, and HIV/AIDS, Congress imposed two specific limitations on government-funded HIV/AIDS programs, to ensure the efficacy and integrity of those programs and require them to prioritize the reduction of behavioral risks, and to prevent dilution of the government's anti-prostitution, anti-sex-trafficking message. First, under 22 U.S.C. § 7631(e), none of the funds at issue "may be used to promote or advocate the legalization or practice of prostitution or sex trafficking."[2] Second, under 22 U.S.C. § 7631(f), no

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[2] Plaintiffs have never challenged this subsection, which goes on to provide that it does not bar the

funds "may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking," with the exception of four specified organizations.

2. The Government's Implementation of the Leadership Act

The United States Agency for International Development ("USAID" or "AID") and the Department of Health and Human Services ("HHS") provide HIV/AIDS programs and services under the Leadership Act in part by funding non-governmental organizations, public international organizations, and other entities. *See* 22 U.S.C. § 2151b-2(c). To implement the Act, the agencies have required funding recipients to agree in award documents that they are opposed to the practices of prostitution and sex trafficking. *E.g.*, 45 C.F.R. § 89.1; *see AOSI*, 133 S. Ct. at 2326.

In addition, USAID and HHS have each issued guidelines specifying that a funding recipient may maintain an affiliation with an organization that lacks the policy required by § 7631(f), as long as the affiliation does not threaten the integrity of the government's programs or its anti-prostitution, anti-sex-trafficking message. *E.g.*, 45 C.F.R. § 89.3. These guidelines were modeled on similar rules upheld as constitutional by the Supreme Court in *Rust v. Sullivan*, 500 U.S. 173 (1991), and others upheld by this Court in *Velazquez v. Legal Services Corp.*, 164 F.3d 757, 763 (2d

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use of federal funding for palliative care, treatment, or certain medicines and supplies. 22 U.S.C. § 7631(e).

Cir. 1999), *aff'd in part*, 531 U.S. 533 (2001), and *Brooklyn Legal Services Corp. v. Legal Services Corp.*, 462 F.3d 219, 232 (2d Cir. 2006). As in those cases, the affiliate guidelines here were meant to alleviate any infringement on a funding recipient's expressive rights caused by the policy requirement, by providing an alternative channel of communication by the recipient that would cabin the requirement's effects. *See* 133 S. Ct. at 2331; 651 F.3d at 225–26, 239.

C. The Supreme Court's 2013 Decision

Plaintiffs Alliance for Open Society International and Pathfinder are U.S.-based non-governmental organizations that receive funds subject to § 7631; InterAction and Global Health Council are umbrella associations of U.S.-based NGOs, many of whose members receive such funding. As described above, the injunction preventing application of § 7631(f) to plaintiffs was granted by the district court, affirmed by this Court, and then affirmed by the Supreme Court.

The Supreme Court described the plaintiffs before it as "a group of domestic organizations engaged in combating HIV/AIDS overseas." 133 S. Ct. at 2326. Considering whether the policy requirement is an unconstitutional burden on those plaintiffs' First Amendment rights, the Court noted that "the relevant distinction that has emerged from our cases is between [permissible] conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and [impermissible] conditions that seek to leverage funding to

regulate speech outside the contours of the program itself." *Id.* While acknowledging that that distinction "is not always self-evident," the Court concluded that § 7631(f) "falls on the unconstitutional side of the line." *Id.* at 2330. The statutory provision is "an ongoing condition on recipients' speech and activities," and ultimately serves as a means of "compelling a grant recipient to adopt a particular belief as a condition of funding." *Id.* That, "by its very nature affects 'protected conduct outside the scope of the federally funded program.'" *Id.* (quoting *Rust v. Sullivan*, 500 U.S. 173, 197 (1991)).

The Court then addressed the agencies' guidance regarding recipients' ability to "work with affiliated organizations that do not abide by the condition." *Id.* at 2331. The government had contended that "the guidelines alleviate any unconstitutional burden on the [plaintiffs'] First Amendment rights" by allowing two alternatives: organizations could "accept Leadership Act funding and comply with Policy Requirement, but establish affiliates to communicate contrary views on prostitution"; or they could "decline funding themselves (thus remaining free to express their own views or remain neutral), while creating affiliates whose sole purpose is to receive and administer Leadership Act funds, thereby 'cabining the effects' of the Policy Requirement within the scope of the federal program." *Id.* (alteration omitted; quoting government's brief).

"Neither approach is sufficient," the Court ruled. *Id.* Affiliates in cases such as *Rust* "allow an organization bound by a funding condition to exercise its First

Amendment rights outside the scope of the federal program." *Id.* But "[a]ffiliates cannot serve that purpose when the condition is that a funding recipient espouse a specific belief as its own. If the affiliate is distinct from the recipient, the arrangement does not afford a means for the *recipient* to express *its* beliefs. If the affiliate is more clearly identified with the recipient, the recipient can express those beliefs only at the price of evident hypocrisy." *Id.*

Accordingly, the Court concluded that the policy requirement "compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program." *Id.* at 2332. Holding that that violates the First Amendment, the Court affirmed this Court's decision.

D. The District Court's 2015 Injunction

Following the Supreme Court's decision, the government agencies continued their practice—in place continuously since the district court's 2008 injunction —of not enforcing the policy requirement against U.S.-based organizations, but applying it to foreign organizations. Some time after the Supreme Court decision, plaintiffs began objecting to the application of the policy requirement to plaintiffs' foreign affiliates.

In September 2014, HHS and USAID each issued notices, formally stating that they would not apply the policy requirement to U.S.-based recipients, but would continue to do so with respect to foreign organizations, including foreign organizations with an affiliation with a U.S.-based organization. *See* 79 Fed. Reg. 55,367 (Sept. 16, 2014) (HHS notice) (JA 375); USAID

Acquisition and Assistance Policy Directive 14-04, at 9-10, 13, 19 (Sept. 12, 2014) (JA 352).

Shortly after those notices were published, plaintiffs submitted three pre-motion letters to the district court, explaining that they would seek a permanent injunction against the application of the policy requirement to their foreign affiliates. (JA 376, 382, 385). Plaintiffs contended, among other things, that application of the policy requirement to the foreign affiliates infringes the First Amendment rights of the domestic plaintiffs, arguing the Supreme Court had "addressed precisely this issue" in holding that when a recipient is "clearly identified" with a U.S.-based affiliate, it cannot be compelled to adopt the policy. (JA 377). The government, in two pre-motion letters, opposed that request (and opposed the grant of any relief without a formal motion and opposition). (JA 379, 1995).

By order dated January 30, 2015, the district court —without a motion for an injunction, or briefing in opposition to the entry of an injunction—granted a permanent injunction to plaintiffs. 106 F. Supp. 3d 355 (S.D.N.Y. 2015) (SPA 1–16). As relevant here, the court ruled that application of the policy requirement to foreign affiliates of the U.S.-based plaintiffs violates the First Amendment under the Supreme Court's decision. The court described the Supreme Court as holding that a

> recipient domestic NGO's right to free speech is violated when it must either comply with the Policy Requirement—an example of forced speech—or face "the

> price of evident hypocrisy" by taking a stance differing from that of its affiliate. Cast in this light, it is clear that whether the affiliate is foreign or domestic has no bearing on whether the recipient domestic NGO's rights would be violated by expressing contrary positions on the same matter through its different organizational components. The nature of the affiliate is not relevant because it is not any right held by the affiliate that the Supreme Court's decision protects. Rather, it is the *domestic NGO's* constitutional right that the Court found is violated when the Government forces it to choose between forced speech and paying "the price of evident hypocrisy."

Id. at 361 (quoting 133 S. Ct. at 2331) (SPA 9–10).

The district court further held that under the Supreme Court's decision, it could foresee "no constitutional application of the Policy Requirement as to domestic NGOs or their affiliates," including NGOs other than plaintiffs. *Id.* at 363 (SPA 14). Thus, the court stated that if the government "intends to apply the Policy Requirement to any organizations whatsoever, then the Government must show cause identifying which categories of organizations and why imposing the requirement would not violate the decisions of this Court and the Supreme Court." *Id.* (SPA 14–15).

Finally, concluding that plaintiffs had shown irreparable harm and success on the merits, the court concluded that a permanent injunction was appropriate. *Id.* (SPA 15–16).

E. The District Court's Denial of Clarification

On consent of the parties, the district court stayed the injunction. Throughout 2015 and 2016, the parties agreed to renew the stay while they conducted settlement negotiations. (JA 14–17). During that time, the agencies continued to apply the statutory requirement to plaintiffs' foreign affiliates.

After good-faith negotiations failed to resolve the matter, the government moved in January 2017 for reconsideration and clarification of the January 2015 injunction. (JA 17). The district court extended the stay of the injunction (over plaintiffs' objection) until the government's motion was resolved. (JA 17).

On June 6, 2017, the district court denied the government's motion and lifted the stay. (SPA 17–30). The court first held that the government had not presented an intervening change in law, new evidence, or clear error, and therefore had not met the standard for reconsideration. (SPA 23–26). The court then applied the same standard to the government's request for clarification of the scope of the injunction. (SPA 26). The court held that its prior command—that the government "is permanently enjoined from applying the Policy Requirement to Plaintiffs or their domestic and foreign affiliates"—is "straightforward." (SPA 26). Rejecting the government's argument that the meaning in practice of "affiliates" was unclear, the court quoted

dictionaries, and ruled that the class of affiliates under those definitions "is almost certainly limited and ascertainable." (SPA 26–27). On that basis, the court held that its injunction met the specificity and definiteness requirements of Fed. R. Civ. P. 65. (SPA 26–27). But, the court continued, if additional guidance is needed, "Plaintiffs have offered a reasonable suggestion to develop clarifying language," and the court directed the parties to confer regarding possible changes. (SPA 27).

Regarding the "show cause" portion of the 2015 order, the district court stated that, as "the Supreme Court's 2013 decision squarely presents the Policy Requirement's potential violation of the First Amendment on its face, not merely as applied," there was "no reason" the show-cause provision was improper. (SPA 28). The district court denied that the 2015 order "extends the injunction to non-parties." (SPA 28–29).

Accordingly, the district court denied the government's motion and lifted the stay. On July 25, 2017, this Court granted the government's motion to stay the district court's injunction pending this appeal. (No. 15-974, ECF Doc. 161).

Summary of Argument

The policy requirement of § 7631(f), applied to foreign organizations acting abroad as a condition on federal funding, does not violate the First Amendment. The district court therefore erred in granting an injunction in plaintiffs' favor.

There is no dispute that a foreign organization operating outside the United States does not enjoy First

Amendment protection. Thus, the foreign organizations at issue in this case cannot claim a violation of their own rights. *See infra* Point I.A. Instead, the U.S.-based plaintiffs assert that applying the funding condition to foreign organizations with which they are affiliated is an infringement of the U.S.-based organizations' own rights. They base that argument on the alleged impediments to their activities and affiliations caused by requiring foreign funding recipients to adhere to the policy requirement. But that is insufficient. The U.S.-based plaintiffs' First Amendment rights have not been violated: because the policy requirement does not apply to them, they are free to speak or advocate as they wish, and free to form partnerships with other foreign or domestic entities as they wish, all without putting their federal funding at risk. As for their argument that they suffer a constitutional harm from the application of the policy requirement to foreign organizations, this Court and the D.C. Circuit have both rejected similar claims, holding that U.S.-based organizations' First Amendment rights of speech and association are not violated by the application of a funding condition to foreign entities with which the domestic organizations wish to form partnerships. A foreign organization's decision to accept federal funding and the conditions that come with it may affect a U.S.-based organization to which it is linked, but any such incidental effect is not enough to allow the U.S.-based entity to claim a First Amendment violation. *See infra* Point I.B.

Plaintiffs incorrectly contend that the Supreme Court's 2013 decision in this case held that applying the policy requirement to a U.S.-based organization's

"clearly identified" affiliate in itself violates the U.S.-based organization's rights. That misreads the Court's opinion. The Court's discussion of "clearly identified" affiliates came in the context of addressing the government's argument that the policy requirement's burden on U.S.-based organizations' First Amendment rights could be alleviated by allowing funding recipients to form affiliates to express different views. The Court concluded that forming affiliates was insufficient to permit the U.S.-based plaintiffs to exercise their First Amendment rights. But as long as U.S.-based organizations are not subject to the policy requirement, they may continue to receive federal funding while freely expressing their own views. Therefore, they may exercise their First Amendment rights directly, and there is no burden on them to alleviate. The Supreme Court's discussion of affiliates is accordingly immaterial to this case, and does not support the district court's ruling, which in practical effect creates First Amendment protection for foreign entities abroad, contrary to established law. *See infra*, Point I.C. The district court's injunction should therefore be reversed.

Even if the district court were correct on the constitutional merits, its injunction should be vacated for its failure to clearly specify what has been enjoined, in accordance with Federal Rule of Civil Procedure 65. The district court enjoined the government from applying the policy requirement to plaintiffs "or their domestic and foreign affiliates." But the court did not make clear what an "affiliate" is, or how that question might be answered. The government is thus left without a clear standard to apply. Moreover, the government

lacks sufficient information about the foreign organizations to evaluate their claims to be "affiliated" under the injunction. The district court's injunction was thus improper, as was its refusal to modify it in response to the government's motion for clarification. *See infra*, Point II.

ARGUMENT

Standard of Review

The Court reviews the grant of a permanent injunction for abuse of discretion. *ACORN v. United States*, 618 F.3d 125, 133 (2d Cir. 2010). A district court abuses its discretion when it commits an error of law, and the Court reviews legal questions de novo. *Id.*

"An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). To obtain a permanent injunction, a plaintiff "must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Id.* at 156–57.

POINT I

The Leadership Act's Policy Requirement Is Constitutional as Applied to Foreign Organizations

The policy requirement of § 7631(f) may be applied constitutionally to foreign organizations operating abroad. Although the Supreme Court has ruled that applying the requirement to U.S.-based funding recipients would violate the First Amendment, it has said nothing about foreign organizations. To the contrary, the Court has repeatedly held that the First Amendment does not protect foreign persons outside the United States. Nor do the links between the U.S.-based plaintiffs and foreign organizations mean that requiring those foreign entities to adhere to § 7631(f) infringes the First Amendment rights of the U.S.-based organizations. Indeed, this Court has twice rejected that reasoning, as has another court of appeals. The policy requirement may therefore be constitutionally imposed on foreign organizations, and the district court's permanent injunction must be reversed.

A. Foreign Entities Outside the United States Are Not Protected by the First Amendment

No foreign organization operating abroad can claim that the policy requirement violates its First Amendment rights, because a foreign person abroad has no First Amendment rights. As the District of Columbia Circuit has summarized the case law, "aliens beyond the territorial jurisdiction of the United States are generally unable to claim the protections of the First Amendment." *DKT Memorial Fund Ltd. v. USAID*,

887 F.2d 275, 284 (D.C. Cir. 1989). Numerous Supreme Court holdings support that conclusion.

In *United States ex rel. Turner v. Williams*, the Supreme Court considered the First Amendment claim of a non-citizen seeking to enter the United States. 194 U.S. 279, 292 (1904). The Court held that such an alien is not "one of the people to whom these things"—that is, the First Amendment freedoms of "worshipping or speaking or publishing or petitioning"—"are secured by our Constitution." *Id.* "[T]hose who are excluded [from the United States] cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise." *Id.*

Similarly, in *Kleindienst v. Mandel*, the Court was faced with the case of a non-citizen who had been denied entry to the United States based on his political expression. 408 U.S. 753, 757–59 (1972). Although not directly confronted with a claim by the alien to First Amendment protection, the Court noted that "[i]t is clear that [the alien] personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise." *Id.* at 762 (citing *Turner*, 194 U.S. at 292). In dissent, Justice Douglas agreed that an alien "has no First Amendment rights while outside the Nation." *Id.* at 771 (Douglas, J., dissenting).

In other contexts, the Court has noted that "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (citing

United States v. Verdugo–Urquidez, 494 U.S. 259, 269 (1990)).

In short, there is no doubt that applying the policy requirement to foreign entities abroad does not violate any First Amendment rights of the foreign entities themselves, as those entities are not protected by the First Amendment. *See DKT Memorial*, 887 F.2d at 284 ("nonresident aliens are without First Amendment rights").

B. Any Effect of Applying the Policy Requirement to Foreign Organizations Does Not Violate the U.S.-Based Organizations' First Amendment Rights

That much is uncontested: neither plaintiffs nor the district court have contended that the First Amendment protects foreign entities abroad. Instead, plaintiffs argue, and the district court held, that by applying the policy requirement to U.S.-based organizations' foreign affiliates, the government has infringed the U.S.-based organizations' own rights. But that proposition has already been rejected by this Court.

1. The Effect on U.S.-Based Organizations of Restrictions on Foreign Entities Does Not Violate the Constitution

In *Planned Parenthood Federation of America, Inc. v. USAID*, the Court addressed a federal funding condition that—like § 7631(f) in the wake of the Supreme Court's 2013 decision—limited foreign organizations but did not apply to U.S.-based entities. 915 F.2d 59 (2d Cir. 1990). The Court rejected a claim by U.S.-

based partners of the affected foreign organizations that their own constitutional rights had been infringed by virtue of the links between the domestic and foreign groups.

The policy at issue (known as the "Mexico City Policy") prohibited foreign organizations that received certain U.S. government funding from providing or actively promoting abortion as a method of family planning, either with federal or non-federal funds. *Id.* at 61–62. U.S.-based organizations were not subject to the policy; they were free to convey their own views or implement their own policies regarding abortion—that is, their own First Amendment rights of expression were unaffected—as long as they did not use federal funds to do so, or pass on federal funds to foreign organizations that promoted or provided abortion services. *Id.* The domestic organizations claimed that this interfered with their First Amendment rights: even though they could voice their own positions on abortion while receiving federal funding, they wished to form partnerships with foreign organizations to work abroad, but the policy prevented or deterred the foreign organizations from participating in those partnerships. *Id.* at 63. In essence, the U.S.-based plaintiffs in *Planned Parenthood* claimed that the burden on their foreign partners' speech and conduct impaired the U.S.-based organizations' ability to function and associate with those partners, and therefore infringed the U.S.-based organizations' First Amendment rights.

This Court disagreed. It held that the Mexico City Policy "does not prohibit [the U.S. organizations] from exercising their first amendment rights," as they could

use their own funds "to pursue whatever abortion-related activities they wish in foreign countries." *Id.* at 64. To the extent the U.S. organizations claimed harm, that was "the result of choices made by foreign NGOs to take AID's money rather than engage in non-AID funded cooperative efforts with" the U.S.-based organizations. *Id.* The alleged harm was thus an "incidental effect" of the federal policy, one that was "obviously" insufficient to constitute an " 'obstacle in the path' of [U.S. organizations] seeking to exercise" their constitutional rights. *Id.*

Twelve years later, this Court confirmed the *Planned Parenthood* ruling in *Center for Reproductive Law and Policy v. Bush* ("*CRLP*"), 304 F.3d 183 (2d Cir. 2002) (Sotomayor, J.). Again, a domestic organization brought suit challenging the Mexico City Policy's funding condition, applied to foreign but not domestic organizations. *Id.* at 186–88. The domestic entity claimed its First Amendment speech and associational rights were violated because the funding condition hindered its ability to collaborate or "form[ ] alliances" with potential foreign partners, diminishing the domestic organization's ability to express or advocate its views. *Id.* at 188–89 (quotation marks omitted). This Court reiterated its prior holding that in such a scenario, there are " 'no constitutional rights implicated' " by applying the funding condition to the foreign entity. *Id.* at 190 (quoting *Planned Parenthood*, 915 F.2d at 66). The domestic organization retained its freedom to speak in the United States or abroad, and the alleged impediment was only an " 'incidental effect' " that "did not rise to the level of a constitutional violation." *Id.* (quoting *Planned Parenthood*, 915 F.2d at 64). While

the *CRLP* plaintiff protested that the effect of the funding condition was more than "incidental," the Court held that even if the impact was "more substantial" or affected the domestic organization's "entire mission," the holding of *Planned Parenthood* still controlled. *Id.* at 191 (quotation marks and emphasis omitted).

Both of those cases accord with the D.C. Circuit's opinion in *DKT Memorial*, also upholding the Mexico City Policy against a claim that applying it to foreign organizations diminished a domestic entity's First Amendment rights to speech and association. 887 F.2d at 286–87. That court held that the domestic funding recipient's right to speak did not extend to the foreign organizations: "A recognition of a right, whether or not constitutionally based, for American entities to pursue certain goals with their own funds while receiving largess from the government for other pursuits does not in any way mandate that the same treatment must be afforded foreign entities." *Id.* at 291. And regarding the domestic NGO's claim that the policy impeded its First Amendment freedom of association, the court held that "the right of Americans to associate with nonresident aliens 'is not an absolute.'" *Id.* at 295 (quoting *Palestine Information Office v. Shultz*, 853 F.2d 932, 941 (D.C. Cir. 1988)). Because "the only thing that presently prevents [the domestic organization] and the [foreign NGOs] from associating . . . is the unwillingness or inability" of the domestic NGO to fund the organizations' joint efforts with its own money, the domestic entity's First Amendment rights were not infringed. *Id.* at 292–93.

These decisions are consistent with the Supreme Court's opinion in *Mandel*. In that case, U.S. citizens claimed that their own First Amendment rights were violated by the exclusion of a foreign professor whose views they wished to hear and debate. 408 U.S. at 756–60. Even recognizing that the U.S. citizens' "First Amendment rights are implicated," *id.* at 765, the Supreme Court denied their claim, holding that in light of Congress's plenary authority to exclude foreign persons, the courts should not "balanc[e] [the] justification" for doing so "against the First Amendment interests of those who seek personal communication" with non-citizens, *id.* at 767–70. As the D.C. Circuit recognized, the assertion that U.S. organizations' right to associate with foreign organizations was harmed by a restriction placed on the latter's activities uses "logic parallel" to that rejected by the Supreme Court in *Mandel*. *DKT Memorial*, 887 F.3d at 295; *see Mandel*, 408 U.S. at 762 (case concerns "narrow issue whether the First Amendment confers upon [U.S. citizens], because they wish to [expressively interact with a foreign person], the ability to determine that [the foreign person] should be permitted to enter the country" despite statutory restriction).

2. Plaintiffs' Links to Foreign Organizations Do Not Prohibit Application of the Policy Requirement to Those Foreign Organizations

Those cases require the dismissal of plaintiffs' current claims. Just as in the Mexico City Policy cases, plaintiffs are free to receive federal funding while simultaneously speaking or advocating as they wish, in

the United States or abroad, regarding the topics covered by the funding condition, as long as they do not use federal funds to do so. Just as in those cases, plaintiffs are free to associate with, form partnerships and affiliations with, or provide their own funding to any foreign organization. And just as in those cases, the harm plaintiffs claim as a result of § 7631(f) results entirely from the foreign affiliates' "choices . . . to take AID's money," and thus become subject to the policy requirement. *Planned Parenthood*, 915 F.2d at 64.

In short, plaintiffs can speak however they want while still receiving the federal funding at issue, with no constraint from the statutory policy requirement. Any effect of that requirement results from the foreign entities' decision to accept it. And this Court has twice ruled that such an effect is "incidental" and insufficient to support a U.S.-based organization's First Amendment claim. *CRLP*, 304 F.3d at 190. The foreign groups' decision to accept federal funding and the conditions that come with it "may make it harder" for U.S. organizations to form partnerships with them, but that choice does not give rise to a constitutional claim. *DKT Memorial*, 887 F.2d at 295 (quotation marks omitted); *see id.* at 297 (domestic NGO is "without any injury to itself").

Indeed, the burden plaintiffs assert in this case is essentially the same as the burden claimed in the Mexico City Policy cases. They maintain that the funding condition applied to their foreign partners and affiliates infringes their own First Amendment rights by impeding those partnerships, even though plaintiffs themselves, as U.S.-based organizations, are able to

speak freely under the Supreme Court's ruling. But as the Mexico City Policy cases recognize, that analysis essentially conflates the foreign organizations' interests with those of the domestic entities. Both here and in those cases, the domestic entities are unconstrained by the funding condition in expressing any view on any subject. The restrictions placed on foreign organizations, even those that have partnerships or affiliations with U.S. entities, do not give rise to anything more than "incidental" harm to the U.S. organizations, insufficient to obtain relief under the First Amendment.

In prior submissions, plaintiffs have contested the relevance of *Planned Parenthood* and *CRLP*, on the ground that the Court's conclusion that the effect on domestic organizations' speech was "incidental" stands in contrast to the serious effects the policy requirement has on U.S.-based entities. (No. 15-974, ECF Doc. 140, at 14 n.6). The factual basis for that conclusion remains untested, as the district court granted the injunction without allowing evidentiary proceedings or even full legal arguments. More fundamentally, the argument misapprehends the meaning of *Planned Parenthood.* In that case—and in *United States v. O'Brien*, 391 U.S. 367 (1968), *cited in Planned Parenthood*, 915 F.2d at 62–63—"incidental" is used not in the sense of "minor," as plaintiffs have suggested, but to mean something that results as a secondary effect from something else.[3] Those effects can

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[3] *See* https://www.merriam-webster.com/dictionary/incidental ("occurring merely by chance or without

be significant: even the "restriction of first amendment freedoms" and "restricting the flow of information and ideas" can be "incidental" effects that are constitutionally permissible. *Teague v. Regional Commissioner of Customs*, 404 F.2d 441, 445–46 (2d Cir. 1968) (citing *O'Brien*); *see Palestine Information Office*, 853 F.2d at 934, 939–40 (government-ordered closing of information office was "incidental impact" that did not "infringe" constitutional rights of speech or association). Indeed, in *O'Brien*, the "incidental" restriction resulted in a criminal conviction. 391 U.S. at 376–77.

Plaintiffs have also alleged (though, again, the allegation is untested) that their ties to foreign entities are particularly close, as they work "arm-in-arm with clearly identified, co-branded affiliates around the world," who all "speak with one voice." (No. 15-974, ECF Doc. 140, at 2–4). But they do not deny that the foreign affiliates are separately incorporated or constituted, and therefore are legally separate entities. *Cf. Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 182–83 & n.8 (1982) (under treaty, companies of one country controlled by a company of another country must be considered separately); *Daimler AG v. Bauman*, 134 S. Ct. 746, 759–60 (2014) (refusing to

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intention or calculation"); https://en.oxforddictionaries.com/definition/incidental ("Occurring by chance in connection with something else" or "Happening as a result of (an activity)"); http://www.dictionary.com/browse/incidental ("happening or likely to happen in an unplanned or subordinate conjunction with something else").

subject foreign corporation to general jurisdiction of U.S. courts based on contacts of U.S. subsidiary or affiliate). Even if they choose to manifest their partnership through common messages or trademarks, and even if they consider the closeness of their partnership "critical to the efficacy" of their missions (No. 15-974, ECF Doc. 140, at 3–4), the partnerships among separate entities are still insufficient under this Court's case law to allow for relief under the First Amendment. *See CRLP*, 304 F.3d at 190 (U.S. organizations claimed federal policy "prevented them from fulfilling their mission" and "impedes [their] *entire* mission" (quotation marks omitted)); *Planned Parenthood*, 915 F.2d at 63 (U.S. organizations claimed federal policy made their mission "impractical").

In sum, the constitutional rights of the domestic organizations have not been infringed: they are not themselves subject to the policy requirement, and the effect of imposing the policy requirement on their foreign affiliates is insufficient for plaintiffs to prevail.

C. The Supreme Court's Decision in This Case Does Not Extend to Foreign Organizations That Affiliate with U.S. Groups

Nothing about that conclusion is changed by the Supreme Court's 2013 decision in this case. Plaintiffs and the district court have heavily relied on a paragraph of the Court's opinion, to conclude that applying the funding condition to a U.S.-based organization's "clearly identified" affiliate effects a constitutionally impermissible burden on the domestic entity. But that

is based on a misreading of the Supreme Court's decision. Contrary to the district court's holding, the Supreme Court did not create a new test, undercutting decades of its precedent, by holding that applying a speech-related funding condition to a foreign entity violates the First Amendment when that entity is "clearly identified" with a U.S.-based organization. The Court was addressing a separate question, and simply said that allowing U.S. entities that receive federal funding, and therefore must comply with the policy requirement, to form affiliated organizations as an alternative means of engaging in their own expression does not alleviate the First Amendment burden the policy requirement imposes on them. Now that the policy requirement does not apply to U.S. entities, there is no burden on any constitutionally protected organization to alleviate. As a result, no further relief is warranted.

To begin with, the Supreme Court did not have any question involving foreign affiliates before it. The Court described the plaintiffs as "a group of domestic organizations," 133 S. Ct. at 2326, and nowhere does the opinion mention foreign entities. This Court was even clearer: it distinguished *DKT Memorial* "as that case centered around a restriction on the First Amendment activities of *foreign* NGOs receiving U.S. government funds. The challenge here is to the impact of the Policy Requirement on *domestic* NGOs. Indeed, the Agencies have applied the Policy Requirement to foreign organizations since its inception, without challenge." 651 F.3d at 238–39 (emphasis in original). To the extent plaintiffs maintain that the Supreme Court has already decided that the policy requirement may

not be applied to their foreign affiliates, they are incorrect.

Nor are plaintiffs or the district court correct that that is the implication of the Court's discussion of the government agencies' regulations regarding affiliates—a discussion they take out of context and thus misinterpret.

The Supreme Court held that § 7631(f) imposed an unconstitutional burden on the domestic funding recipients' speech rights. 133 S. Ct. at 2328–30. It then concluded that that burden on First Amendment-protected organizations could not be "alleviate[d]," as the government had contended, by allowing funding recipients to "work with affiliated organizations." *Id.* at 2331. In particular, the Court noted that in *Rust* and other cases, an arrangement with an affiliate "allow[ed] an organization bound by a funding condition to exercise its First Amendment rights outside the scope of the federal program." *Id.* But "[a]ffiliates cannot serve that purpose when the condition is that a funding recipient espouse a specific belief as its own," as is the case with the policy requirement. *Id.*

As the Court explained, it proves impossible to allow an organization subject to the policy requirement to both comply with that requirement and express views inconsistent with it by using affiliates. "If the affiliate is distinct from the recipient, the arrangement does not afford a means for the *recipient* to express *its* beliefs. If the affiliate is more clearly identified with the recipient, the recipient can express those beliefs only at the price of evident hypocrisy." *Id.* (emphasis

in original). A First Amendment-protected organization bound by the policy requirement can therefore never freely express its views, and for that reason the government's proposed solution of using affiliates to cabin the effects of the policy requirement is not enough to cure the constitutional problem.

But none of that suggests that imposing the policy requirement as a funding condition on a foreign organization—which lacks First Amendment protection—infringes the constitutional rights of any U.S.-based organization, no matter how close the organizations' relationship with each other. As the Court made clear, it addressed affiliates to determine if there were a way to "allow an organization bound by a funding condition to exercise *its* First Amendment rights," 133 S. Ct. at 2331 (emphasis added)—that is, to allow a First Amendment-protected organization whose speech is limited by the policy requirement to retain its right to speak about prostitution and trafficking. Affiliates do not allow that. But there is no longer any need for such a work-around: because U.S.-based entities are no longer "bound by [the] funding condition," all First Amendment-protected entities may disregard the policy requirement and speak freely themselves while still receiving funding, and there is no First Amendment burden to be "alleviate[d]." 133 S. Ct. at 2331. Foreign organizations may still be "bound by" the policy requirement, but they have no First Amendment rights "to exercise" or that can be burdened. *See* Point I.A, *supra*. The Supreme Court's rejection of affiliates as an alternative means of speech to protect the rights of those subject to the policy requirement is therefore not relevant to the case now before the Court.

Thus, the district court was incorrect in describing the Supreme Court as holding that "a recipient domestic NGO's right to free speech is violated when it must either comply with the Policy Requirement . . . or face 'the price of evident hypocrisy' by taking a stance differing from that of its affiliate." 106 F. Supp. 3d at 361. The Court did not say that "either" of those violates the Constitution. Instead, it held that "the price of evident hypocrisy" is a fatal flaw in the proposed means for alleviating the constitutional burden caused by the policy requirement—not, as the district court implied with its "either . . . or" formulation, a constitutional violation standing alone.

Similarly, plaintiffs have incorrectly argued that the Supreme Court has held that "imposing the Policy Requirement on any 'clearly identified' affiliate of a U.S. Plaintiff . . . burdens the First Amendment rights of the U.S. Plaintiff because the U.S. Plaintiff cannot express beliefs inconsistent with the government's views except at 'the price of evident hypocrisy.'" (No. 15-974, ECF Doc. 140, at 13). But the premise of the Supreme Court's discussion about relieving the burden on plaintiffs' First Amendment rights was that plaintiffs were themselves required to comply with the policy requirement while receiving federal funds, and had rights under the First Amendment. 133 S. Ct. at 2326–30. Now that U.S.-based funding recipients are not subject to the policy requirement, they are fully able to "express beliefs inconsistent with the government's views," simply by speaking, which they can do with no risk to their funding or any other government-imposed consequence.

Nor has the Supreme Court created a constitutional privilege to be free from "evident hypocrisy." The Court simply used "clearly identified" affiliates as an illustration of the shortcomings of the government's efforts to "cabin[] the effects" of the policy requirement. 133 S. Ct. at 2331 (quotation marks omitted). But now that the policy requirement does not apply to U.S. organizations, there are no effects on them to cabin. Moreover, the Supreme Court's decision addressed affiliates "establish[ed]" or "creat[ed]" for the purpose of communicating views inconsistent with the policy requirement, but the affiliates at issue in this case appear to be preexisting entities. While an entity that states a policy while at the same time setting up an affiliate for the express purpose of stating an opposite view could reasonably be perceived as unbelievable or hypocritical, disagreement among established organizations, even if they share a name or brand, may easily be seen as just that: disagreement.

Any chance of hypocrisy or confusion about whether the message of one group should be attributed to its affiliated group can be dissipated with a simple disclaimer, stating that each organization speaks only for itself. And the possibility that the U.S. organization's message will be muddled by statements of a foreign affiliate is remote where the U.S. organization can state its views as clearly as it wishes, without restriction. Nothing about that violates the First Amendment.

Thus, contrary to plaintiffs' argument, "clearly identified" is not a test the Supreme Court set out for determining when applying the policy requirement to

foreign entities violates the First Amendment—contradicting the Court's previously repeated rejection of constitutional protection for foreign entities. If plaintiffs are correct that "co-branding" is enough to gain protection as a "clearly identified" affiliate, the claimants in *CRLP* and *Planned Parenthood* could have prevailed simply by allowing a like-minded foreign entity to use their name and logo.[4]

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[4] Nothing in the recent interim order in *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080 (2017) (per curiam), changes this analysis. That decision temporarily permitted preliminary injunctive relief for U.S. persons based on actions affecting foreign persons who have credible claims of bona fide relationships with persons or entities in the United States. The Court's decision was addressed to the balance of harms in that particular context, in applying the standards for preliminary injunctive relief and stays. In that context, the Court discussed harms allegedly suffered by those U.S. persons or entities as a result of delayed or denied entry into the United States of aliens with whom they have credible claims of close familial relationships or, for entities, similarly close ties. *Id.* at 2087–89. That discussion of the equitable balancing of harms has no relevance here, as this case concerns plaintiffs who themselves have the full freedom to speak on the issues covered by the policy requirement. In addition, *IRAP* considered only interim relief, which serves "not to conclusively determine the rights of the parties, but to balance the equities as the litigation moves forward." *Id.* at 2087.

The effect of the district court's ruling is that all a foreign entity needs to do to receive the Constitution's protection is to find a U.S.-based organization willing to "affiliate" with it—or create such a U.S.-based entity itself. Practically speaking, the district court's ruling thus constitutionally protects foreign entities that the Supreme Court has held possess no constitutional protection. Its ruling therefore contravenes longstanding Supreme Court law, as well as the holdings of this Court in *Planned Parenthood* and *CRLP*. The injunction must therefore be reversed.

POINT II

The District Court Should Have Modified Its Unclear Injunction

Even if the Court were to accept plaintiffs' constitutional position, it should still vacate the injunction, as the district court's order is unclear, and thus violates Federal Rule of Civil Procedure 65.

"Injunctions are serious orders . . . and such an order must give notice of the specific conduct ordered or prohibited." *Patsy's Italian Restaurant, Inc. v. Banas*, 658 F.3d 254, 263 (2d Cir. 2011). Under Federal Rule of Civil Procedure 65(d), an injunction must "state its terms specifically" and "describe in reasonable detail . . . the act or acts restrained or required." " 'Basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed.' " *Corning Inc. v. PicVue Electronics, Ltd.*, 365 F.3d 156, 158 (2d Cir. 2004) (quoting *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (per curiam) (alteration omitted)). Thus, a party must be able "to ascertain from the four corners

of the [injunction] precisely what acts are forbidden"; if the order "does not satisfy the requirement of specificity and definiteness," it "will not withstand appellate scrutiny." *Id.* (quotation marks omitted).

The district court enjoined the government from "applying the Policy Requirement to Plaintiffs or their domestic and foreign affiliates." (SPA 15–16). But it is not at all clear who those "affiliates" are, or how they might be determined. The government agencies lack specific information concerning most of the numerous individual foreign entities that plaintiffs might claim are affected by the injunction—for instance, their identities, the circumstances of their formation, and the degree and nature of their affiliation with domestic organizations. There are no established criteria for determining whether one organization is an "affiliate" of another for this purpose. Nor does the government have the necessary facts to make that determination—facts that necessarily rest in the control of each plaintiff and its alleged affiliate.

Despite these flaws, the district court declined to modify the injunction in response to the government's motion to clarify it. (SPA 17–30). That was error.

To begin with, the primary ground the district court stated for denying the government's 2017 motion was that such motions are not permitted "to advance theories not previously argued," but are only proper if the district court "overlooked" controlling law or facts, or if there has been an intervening change in law or new evidence. (SPA 24). The court denied the government's motion, stating it only presented arguments the court had already considered. (SPA 24–26). But

that overlooks the fact that the district court never permitted the filing of a motion or the submission of full opposition papers—nor, despite the government's requests for a full motion and chance to oppose it (JA 381, 1997), did the court give the government notice that its two pre-motion letters would be the only opposition the court would permit to plaintiffs' never-filed motion for an injunction. The rule that a motion for reconsideration may not simply reargue points already made depends on there having been a fair chance to argue those points in the first place. Although this Court permits district judges to require pre-motion conferences or letters, nothing about that practice obviates the requirement of Federal Rule of Civil Procedure 7(b)(1) that a request for judicial relief "must be made by motion," to which an opponent has the opportunity to respond, *see* S.D.N.Y. Local Civil Rule 6.1(b). This Court has held that it is "inconsistent with the course of litigation prescribed by the Federal Rules" for a district court to rule based merely on a "preview" of the motion. *Loreley Financing (Jersey) No. 3 Ltd. v. Wells Fargo Securities, LLC*, 797 F.3d 160, 190 (2d Cir. 2015). The district court's decision not to revisit the injunction should be vacated for that reason alone.

In addition, on the merits the district court was wrong to decline to modify the injunction to make it more clear. Applying a "clear error or manifest injustice" standard for reconsideration of the January 2015 order—again, in contravention of the fact that it was not reconsidering, but considering for the first time, the government's arguments regarding the language

of the injunction—the district court held that its command not to apply the policy requirement "'to Plaintiffs or their domestic and foreign affiliates' is straightforward," a conclusion it supported by quoting dictionary definitions of "affiliate." (SPA 26–27). But none of those definitions resolved the lack of clarity, or the lack of a clear standard for the government to apply in attempting to implement the injunction. Defining "affiliate" as an "organization officially attached to a larger body," as the district court did, simply defers the indeterminacy from one word to another, and provides the government with no additional means of discerning who should get the benefit of the injunction.

Indeed, the district court essentially admitted that its order was unclear, by opining that the class of "affiliates" is "almost certainly limited and ascertainable," then suggesting that plaintiffs could provide the government with additional guidance. (SPA 27). But "almost," even if true, is not enough to provide "explicit notice of precisely what conduct is outlawed." *Schmidt*, 414 U.S. at 476. And Rule 65 requires the injunction itself to contain specific directives, not to contemplate later substitution of an adequately clear instruction, provided by the party seeking the injunction. The lack of compliance with Rule 65 provides another reason to vacate the injunction.

CONCLUSION

The district court's injunction should be reversed.

Dated: New York, New York
August 4, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and this Court's Local Rules. As measured by the word processing system used to prepare this brief, there are 9634 words in this brief.

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15-974(L)

17-2126(CON)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., OPEN SOCIETY INSTITUTE, PATHFINDER INTERNATIONAL, GLOBAL HEALTH COUNCIL, INTERACTION,
Plaintiffs-Appellees,

v.

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, MARK GREEN, in his Official Capacity as Administrator of the United States Agency for International Development, BRENDA FITZGERALD, in her official capacity as Director of the U.S. Centers for Disease Control and Prevention, and her successors, ERIC D. HARGAN, in his official capacity as Acting Secretary of the U.S. Department of Health and Human Services, and his successors, UNITED STATES CENTERS OF DISEASE CONTROL AND PREVENTION, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York, No. 05-cv-8209 (Marrero, J.),

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November 3, 2017

CORPORATE DISCLOSURE STATEMENT

Appellees have no parent corporations, and no publicly held company owns 10% or more of any Appellee's respective stock.

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INTRODUCTION

Appellees and their member organizations are U.S.-based nongovernmental organizations ("NGOs") engaged in the global fight against HIV/AIDS. To most effectively carry out their life-saving work around the world, many of these NGOs operate through affiliates that share the same name, logo, branding, and mission as Appellees in order to speak with one voice on global public-health issues.

Since 2005, when this litigation began, Appellees have successfully challenged a government-mandated anti-prostitution pledge, known as the Policy Requirement, that makes the receipt of federal funding to combat HIV/AIDS contingent on the grant recipient's profession of agreement with the government's viewpoint on prostitution and its consequences—a significant topic of debate in the international public-health arena. In 2006, the district court issued a preliminary injunction against the Policy Requirement's enforcement, which this Court affirmed in 2011. In 2013, the Supreme Court upheld this Court's decision, holding that the Policy Requirement "violates the First Amendment and cannot be sustained." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.* ("*AOSI*"), 133 S. Ct. 2321 (2013), *aff'g*, 651 F.3d 218 (2d Cir. 2011).

When the government failed to heed that ruling, Appellees spent months trying unsuccessfully to bring the government into compliance and eventually moved for a permanent injunction to enforce the Supreme Court's judgment.

Applying the Supreme Court's reasoning, the district court granted the motion to afford Appellees complete relief for the First Amendment harm the Supreme Court identified—including the harm to them from imposing the Policy Requirement on their clearly identified affiliates. The issue in this appeal is whether, in crafting that permanent injunction, the district court abused its discretion by including Appellees' co-branded foreign affiliates within the injunction or by failing to make the boundaries of the injunction sufficiently clear. It did not.

The government's core argument is one that it already pressed—and lost—in the Supreme Court. The government contended then, as now, that imposing the Policy Requirement on Appellees' affiliates—compelling them to profess their agreement with the government's preferred point of view while leaving Appellees ostensibly free to take a contrary view—would not violate Appellees' First Amendment rights because the effects of the Policy Requirement would be "cabined" to the affiliates. The Supreme Court rejected that argument. The Court held that, unlike the speech restriction in *Rust v. Sullivan*, 500 U.S. 173 (1991), the Policy Requirement is forced speech, which compels "the affirmation of a belief that by its nature cannot be confined" to the federal spending program or to a single member of a network of clearly identified, related entities. *AOSI*, 133 S. Ct. at 2332. Rather, as the Court explained, where an affiliate is "clearly identified" with the Appellee organization and the affiliate's view will thus be imputed to the

Appellee, forcing the affiliate to espouse the government's view violates the Appellee's rights because the Appellee can express a view contrary to the government's—and thus contrary to the government-compelled speech of Appellee's affiliate—"only at the price of evident hypocrisy." *Id.* at 2331.

The Supreme Court's reasoning applies equally to any "clearly identified" affiliate, regardless of where it may be incorporated. Although it has always been understood that the affiliates at issue in this case are foreign-based—indeed, that fact was discussed in the briefing and at oral argument before the Supreme Court, as well as in the earlier briefing before this Court and the district court—the Court said nothing to suggest that location mattered and did not confine its analysis to domestic affiliates. Instead it recognized that a forced profession of belief "cannot be confined" to a single affiliate and that the Policy Requirement will thus invariably burden Appellees' speech when imposed on their clearly identified, co-branded affiliates (foreign or otherwise). *AOSI*, 133 S. Ct. at 2332. The government cannot relitigate that point, which is now not only law of the case, but also a binding constitutional holding of the Supreme Court that supports the injunction here and forecloses the government's attempt to effectively relitigate the same arguments.

The government separately claims that the terms of the injunction are too indefinite and that the identities of Appellees' affiliates are unclear. But the

entities involved here are longstanding federal grant recipients that are well known to the government: Appellees' affiliates are incorporated in other countries, but all operate under the same name, logo, and corporate framework as their domestic counterparts; all work together toward the same common humanitarian mission; and all speak with one voice. Tellingly, the government does not actually claim that it is confused about who Appellees' affiliates are or that it lacks the ability to identify them. Indeed, as suggested by Appellees and the district court, the government had and still has the opportunity to receive whatever additional information it requires from Appellees, but it has declined that opportunity. The government's unsubstantiated insistence on additional "clarity" now should not delay the vindication of Appellees' First Amendment rights.

Appellees have litigated this action in defense of their First Amendment rights for well over a decade. Their arguments have prevailed at every stage, including in the Supreme Court. It is time for this case to end. This Court should affirm the district court's carefully crafted injunction implementing the Supreme Court's decision in their favor.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in permanently enjoining the government from applying the Policy Requirement to Appellees' foreign affiliates.

2. Whether the injunction is sufficiently clear.

STATEMENT OF CASE

A. Appellees' And Their Affiliates' Global Work Against HIV/AIDS

Appellees and their members (collectively "Appellees") are U.S.-based NGOs dedicated to issues of public health and substantially engaged in the international effort to prevent and treat HIV/AIDS around the globe.

Appellee Pathfinder International has worked to improve family-planning services in the developing world since 1957. JA85-86. Pathfinder engages in HIV/AIDS prevention, care, and counseling programs across Africa, including efforts to prevent mother-to-child transmission of HIV in Kenya, JA89-90, and programs to promote HIV-prevention methods among sex workers in India, JA93.

Appellee Alliance for Open Society International ("AOSI") promotes democracy, human rights, and public health in Central Asia. Dkt. 3-11, at 2. Among other work, AOSI implemented a program throughout Central Asia to limit the use of injection drugs and thereby stem the spread of HIV/AIDS. *Id.* at 3-5.

Appellee Global Health Council was, at the time this action was filed, the largest professional association dedicated to international public health.

Appellee InterAction is the largest alliance of U.S.-based international-development and humanitarian NGOs. Its members include Pathfinder and numerous other NGOs, including Cooperative for Assistance and Relief

Everywhere, Inc. ("CARE USA"), one of the world's largest private international humanitarian organizations, JA70, 1928; World Vision International, a global Christian relief, development, and advocacy organization, World Vision International, *Our Core Values*, http://www.wvi.org/our-core-values; and Save the Children Federation, Inc., which works to give children everywhere a healthy start, the opportunity to learn, and protection from harm, JA1989. Each of these organizations engages in critical HIV/AIDS work around the world. *See*, *e.g.*, JA73-75 (CARE Decl.); JA1991 (Save the Children Decl.); World Vision International, *HIV and AIDS Programmes*, http://www.wvi.org/health/hiv-and-aids-programmes.

Collectively, Appellees operate in more than one hundred and twenty countries throughout the world, performing life-saving public-health work with the help of funding from a wide variety of sources, including the United States and foreign governments, agencies of the United Nations and the World Bank, and private foundations, corporations, and individuals. JA26, 61, 71, 86, 293-295, 1853, 1928-1929, 1989 (Global Health Council, IntraHealth, CARE, Pathfinder, InterAction, and Save the Children Decls.).

Many Appellees carry out a substantial part of their work through legally separate affiliates that together make up a global federation or family of entities that share the same name, brand, logo, and mission. Some Appellees may use

branch offices in certain foreign countries without having any separately incorporated entities there, but the foreign affiliates at issue in this case are legally distinct entities, incorporated in the countries in which they are located, each as an integral part of a cohesive, co-branded organization. For example, CARE USA is a founder and leader in the global federation CARE International, which itself is separately incorporated. JA1928. Within CARE International are thirteen legally separate entities—CARE USA and its twelve foreign affiliates—each located and incorporated in different countries. *Id.* World Vision International, based in California, is likewise an international coordinating body that oversees a partnership of separately incorporated affiliates around the globe, including a U.S.-based affiliate, collectively operating in nearly 100 countries. *See* http://www.wvi.org/structure-and-funding; http://www.wvi.org/map/where-we-work. Other Appellees use similar structures. *See, e.g.*, JA1989 ("There are currently national Save the Children Organizations, such as [Save the Children US] and [Save the Children United Kingdom], incorporated in 30 countries around the world[.]"); JA1853 ("Pathfinder also uses foreign affiliates. These entities share important bonds with Pathfinder, but are legally distinct, incorporated in the countries in which they are located.").

The decision to establish separate in-country affiliated entities is driven by multiple factors. Most notably, the U.S. government, particularly Appellant U.S.

Agency for International Development ("USAID"), has encouraged U.S.-based NGOs like Appellees to conduct their HIV/AIDS work through separately incorporated foreign affiliates rather than through branch offices. *See* JA1933. Through a program known as USAID Forward, intended to build local capacity and promote sustainable development in foreign countries, USAID regularly emphasizes a preference for separate, local incorporation in foreign countries and has shifted funding opportunities toward organizations with that structure. JA1859-1860. As a result, for many grant opportunities, federal funding is available only to NGOs that are incorporated in the country where the program will be conducted. JA1854, 1860-1861. In addition, some foreign governments require NGOs to be incorporated in-country to perform public-health work there. JA1854. Without operating through foreign affiliates, therefore, Appellees would often be ineligible or uncompetitive for funding critical to carrying out their life-saving programs or even barred from working in some countries altogether. JA1854-1855, 1860-1861, 1933.

Regardless of how Appellees' international federations are formally organized, each Appellee and its co-branded family of affiliates operates as a cohesive group and appears to the public as a single, indistinguishable entity. As CARE USA explained in its 2014 declaration, its affiliates' "[o]ffices, marketing materials, and signage are indistinguishable." JA1931; *see also, e.g.*, JA1855

(Pathfinder's "foreign affiliate offices, marketing materials, and signage are indistinguishable from the offices, literature, and signage of Pathfinder [USA.] … [T]he branding of the U.S. entity is identical to that used by Pathfinder's foreign affiliates").

The common identity of affiliates is most obviously conveyed through use of a shared name, logo, and branding. For instance, CARE's affiliates, including CARE USA, are referred to simply as "CARE" or "CARE" plus the name of the country in which they operate—*e.g.*, "CARE India." JA1932. World Vision, Save the Children, and Pathfinder follow the same convention, identifying their affiliates as, for example, "Pathfinder South Africa," "Save the Children Australia," and "World Vision Tanzania." *See* JA1855 (Pathfinder Decl.); JA1989, 1992 (Save the Children Decl.); *see also* http://www.wvi.org/tanzania.

As illustrated by pictures introduced into the record of this litigation, each U.S.-based organization also shares identical branding with its affiliates across the globe. For example, each organization presents its name, *e.g.*, "CARE" or "Save the Children" in the same font, style, and colors as its affiliates, and affiliates share the same corporate logo, such as CARE USA's circle with overlapping hands around the circumference, or Save the Children's bright red circle around a child

with outstretched arms.[1] Additionally, affiliates within a given federation or organization speak with a single voice and subscribe to a common mission regarding the focus of their public-health efforts and common guiding principles of how services will be delivered. *See*, *e.g.*, JA1929 (CARE Decl.) (explaining that all affiliates are bound by a common code requiring a commitment to CARE's "governance, vision, mission, programming principles, humanitarian mandate, [and] common Codes of Ethics and Conduct"); World Vision International, *Vision and Values*, http://www.wvi.org/vision-and-values (setting forth "mission," "vision," "approach," and "values" that guide World Vision's work and explaining that each affiliate must "covenant" to "uphold" these to remain in the partnership).

[1] *Compare* JA1979 (image of signage at CARE USA office), *with* JA1981-1987 (images of signage at CARE Cambodia, Bolivia, Ghana, and Jordan); *compare* JA1867-1868 (images of signage at Pathfinder's U.S. headquarters), *with* JA1863-1864 (image of signage at Pathfinder South Africa); *compare* World Vision International, http://www.wvi.org (using name "World Vision" and unique corporate logo for World Vision International website), *with* World Vision Ecuador, https://www.worldvision.org.ec, *and* World Vision South Africa, http://www.worldvision.co.za (using same name and corporate logo for World Vision Ecuador and World Vision South Africa websites); *compare* Save the Children Federation, Inc., http://www.savethechildren.org/site/c.8rKLIXMGIpI4E/b.6115947/k.B143/Official_USA_Site.htm (using name "Save the Children" and corporate logo for Save the Children US website), *with* Save the Children Mexico, https://www.savethechildren.mx (using same "Save the Children" name and same corporate logo for Save the Children Mexico website), *and* Save the Children India, https://www.savethechildren.in (using name "Save the Children India" and same corporate logo for Save the Children India website).

As Appellees have experienced and attested, when affiliates within a federation share an indistinguishable identity, it creates "a two-way street," JA1855 (Pathfinder Decl.), in which actions or statements by foreign affiliates are imputed to the U.S. NGO and vice versa. For example, "[i]n Pathfinder's experience, any Pathfinder entity, whether separately incorporated in a foreign country or not, is viewed by the public as part of a single entity. Pathfinder's speech and actions are likely imputed to its foreign affiliates and the speech and actions of its foreign affiliates are likely imputed to Pathfinder." JA1856; *see also* JA1932 (CARE affiliates "are viewed by the public as one CARE entity speaking with a single global voice[.] … The public sees and hears CARE as one entity operating through a common identity to achieve a common mission."); JA1992 (Save the Children affiliates "are viewed by the public as speaking in a single global voice aligned to their common mission").

Because of this "two-way street," a federation must speak globally with one voice and one consistent message. *E.g.*, JA1934 ("A common voice and approach is critical to CARE's success[.]"); JA1992 ("Save the Children's strength and effectiveness as a global movement is in its collective, global identity and approach."). Speaking with a unified voice across affiliates is essential to a federation' ability to accomplish its public health mission, raise funds, build a reputation, recruit personnel, become an influential voice on public-health policy,

and keep employees safe from situations where an affiliate's espousing of a view that is unpopular in certain parts of the world can put staff in in immediate danger, not just in the country where the words have been spoken but wherever such speech might cause offense, run afoul of a cultural norm, or violate the law. *See* JA1856-1857, 1930-1931, 1934-1935 (Pathfinder and CARE Decls.). Maintaining a single, organization-wide voice on issues of consequence or sensitivity, such as global health policy, HIV/AIDS, or the health implications of prostitution, is particularly important.

Appellees and their affiliates take various steps to ensure consistency in their messages. For example, Pathfinder requires foreign affiliates to vet any proposed communication with Pathfinder's U.S. headquarters before taking a position on public-health issues. JA1857; *accord, e.g.*, JA1929-1930, 1944-1958 (CARE Decl. & Ex. 1) (detailing portions of CARE's governing code that regulate public messaging by any CARE affiliate by requiring sign-off of other CARE entities); World Vision, *Covenant of Partnership*, http://www.worldvision.co.za/who-we-are/what-we-believe (providing overview of World Vision's Covenant of Partnership requiring affiliates to ensure public communications are "consistent" as a condition of remaining in the partnership).

B. The Policy Requirement

The United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Leadership Act") was enacted to strengthen the U.S. response to the global HIV/AIDS epidemic. 22 U.S.C. §§ 7601, 7603. Finding that the federal government's partnerships with NGOs have been "critical to the success" of efforts to combat HIV/AIDS, *id.* § 7621(a); *id.* § 7603(4), Congress appropriated billions of dollars under the Act to support the work of NGOs engaged in HIV/AIDS treatment and prevention.

The government evaluates applicants for Leadership Act funds based on, among other criteria, their "past performance." USAID, ADS 303.3.9 (rev. Apr. 3, 2017), *available at* https://www.usaid.gov/sites/default/files/documents/1868/303.pdf. To demonstrate past performance, "[a]n applicant must provide a list of all its cost-reimbursement contracts, grants, or cooperative agreements involving similar or related programs during the past three years." *Id.*; *see also* 22 U.S.C. § 2151u(a) (limiting eligibility for USAID funds to NGOs that "have demonstrated a capacity to undertake effective development activities"). Applicants that are considered "Private Voluntary Organizations," which includes all Appellees, must also have been incorporated for at least 18 months. *See* 22 C.F.R. § 203.3(f)(4).[2]

[2] "Private Voluntary Organizations" are U.S.-based nonprofit organizations that receive some amount of private funding and conduct foreign assistance programs abroad. 22 C.F.R. § 203.2(p).

Recipients of Leadership Act funds are prohibited from using those funds to "promote or advocate the legalization or practice of prostitution or sex trafficking." 22 U.S.C. § 7631(e). That prohibition on the use of government funds is not at issue in this litigation. But the Leadership Act places other conditions on recipients more generally. At issue here, the Leadership Act imposes an affirmative pledge or speech requirement, known as the "Policy Requirement," under which recipients of Leadership Act funds (with a few exceptions) must "have a policy explicitly opposing prostitution and sex trafficking." *Id.* § 7631(f). The Policy Requirement is not tied to the use of funds; rather, it affects each recipient on an entity-wide basis, requiring the recipient to adopt and espouse as its own the government's preferred viewpoint:

> No [Leadership Act] funds … may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking, except that this subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency.

Id.

As implemented by Appellants USAID and U.S. Department of Health and Human Services ("HHS"), the Policy Requirement both requires an affirmative declaration of policy and prohibits grant recipients from "engag[ing] in activities inconsistent with the recipient's opposition to the practices of prostitution and sex trafficking"—even when using private funds and acting outside the scope of any

government program. 45 C.F.R. § 89.3. Neither the Leadership Act nor the regulations define the types of speech or activities that would be deemed "inconsistent with" opposition to prostitution.

Although Appellees do not support or wish to support prostitution, absent the Policy Requirement they would not adopt policies expressing an opposition to prostitution. JA32, 63, 73-74, 76, 89-90, 300-301 (Global Health Council, IntraHealth, CARE, Pathfinder, and Interaction Declarations). Appellees operate in countries with disparate laws and social norms, JA90, 301, and they often work directly with sex worker communities through programs with proven track records of reducing rates of HIV infection among that population. JA74-75, 92-94, 295. The Policy Requirement compels Appellees to express a view that Appellees believe "stigmatizes one of the very groups whose trust they must earn to conduct effective HIV/AIDS prevention." JA37; *see* JA65-66, 74-76. Due in part to that stigmatization, the Policy Requirement impedes critical HIV/AIDS work that Appellees and other recipients of Leadership Act grants do with one of the most vulnerable communities. *See, e.g.*, Amicus Br. of Public Health Deans & Professors, No. 12-10 (U.S. Apr. 3, 2013); Amicus Br. of Secretariat of Joint United Nations Programme on HIV/AIDS, No. 12-10 (U.S. Apr. 3, 2013).

Moreover, Appellees generally prefer to remain neutral on contentious political and cultural issues; when they do adopt specific policies, they do so based

on the merits from a public-health standpoint, after studying the issue and determining that the policy would promote a desired health outcome. JA65, 90, 1858-1859 (IntraHealth and Pathfinder Decls.).

C. Preliminary Injunction Litigation

Given that the Policy Requirement deprived them of the option to remain neutral on an important public-health issue or to express a view contrary to the government's, AOSI and Pathfinder brought this action to enjoin the Policy Requirement in September 2005, shortly after USAID and HHS began enforcing it against them. The district court granted a preliminary injunction, holding that Appellees were likely to succeed on their claim that the Policy Requirement violates the First Amendment and that enforcing the Policy Requirement would irreparably harm Appellees by chilling their speech and undermining their HIV/AIDS work around the world. 430 F. Supp. 2d 222 (S.D.N.Y. 2006). The government appealed to this Court and informed the Court at oral argument of its intent to issue new implementing regulations that it claimed would resolve Appellees' First Amendment claim. 254 F. App'x 843, 845-846 (2d Cir. 2007). The revised regulations, issued in July 2007, did not relieve funding recipients of the obligation to comply with the Policy Requirement but purported to "clarif[y] that an independent organization affiliated with a recipient of Leadership Act funds need not have a policy explicitly opposing prostitution" and could engage in

activities inconsistent with a policy opposing prostitution, "so long as the affiliate satisfies the criteria for objective integrity and independence." JA21, 23 (July 23, 2007 Guidelines).[3] The revised guidelines explained:

> By ensuring adequate separation between the recipient and [the] affiliate organizations, these criteria guard against a public perception that the affiliate's views on prostitution and sex trafficking may be attributed to the recipient organization and thus to the government.

JA21. This Court remanded to the district court to reconsider the preliminary injunction in light of the new regulations. 254 F. App'x at 846.

The district court held on remand that the guidelines did not cure the First Amendment problem. 570 F. Supp. 2d 533 (S.D.N.Y. 2008).[4] Declarations from Appellees and an expert in the law governing NGOs explained that it would be prohibitively burdensome to create, incorporate, and register duplicates of each of Appellees' foreign affiliates in the many countries where Appellees operate—*e.g.*, a second CARE India or a second World Vision Tanzania. JA40-45, 59-68, 81-84, 99-115, 188-215, 303-306 (explaining difficulties of establishing and registering

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[3] USAID and HHS identified factors they would consider in deciding, "on a case-by-case basis," whether an affiliate is sufficiently separate, so that its conduct should not be attributed to the federal-funding recipient. JA22-24. Those factors include whether the entity has separate personnel and facilities and whether "signs and other forms of identification … distinguish" the affiliate from the recipient. *Id.*

[4] After AOSI and Pathfinder secured the first preliminary injunction in 2006, Appellants persisted in enforcing the Policy Requirement against similarly situated U.S.-based NGOs. JA297. On remand, therefore, the associational plaintiffs, InterAction and Global Health Council, sought to join the case, which the district court allowed while expanding the preliminary injunction to protect their members.

affiliated NGOs in foreign countries). The district court found the "extreme separation" required by the guidelines unjustified, 570 F. Supp. 2d at 548, and further held that even if the guidelines could provide an adequate outlet for speech, they did not remedy the unconstitutionality of "requiring [Appellees] to adopt the Government's view," *id.* at 545.

A second appeal followed. USAID and HHS again issued revised guidelines purporting to allow greater flexibility to partner with affiliates. *See* HHS, Organizational Integrity of Entities That Are Implementing Programs and Activities Under the Leadership Act, 75 Fed. Reg. 18,760 (Apr. 13, 2010) (codified at 45 C.F.R. pt. 89) (JA328-332); USAID, AAPD 05-04 amend. 3 (Apr. 13, 2010) (JA333-350). But the revised guidelines continued to require any recipient of Leadership Act funds to affirmatively state in the funding document that it is "opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children." 45 C.F.R. § 89.1(b). The government contended that the guidelines "alleviate[d] any burden on recipients who do not wish to communicate the government's message" by allowing "[a]ny organization unwilling to state its opposition to prostitution or sex trafficking" to "remain neutral or continue advocating its contrary view, while 'setting up a subsidiary organization'" that would comply with the Policy Requirement. U.S. Br. 57, No. 08-4917-cv (2d Cir. May 11, 2010). "The parent

organization," the government maintained, would "not [be] compelled to speak any message at all, and [could] continue to engage in activities inconsistent with the required policy with funding from other sources." *Id.*

This Court rejected that argument and affirmed the preliminary injunction, explaining that "whether the recipient [of Leadership Act funds] is a parent or an affiliate, it is required to affirmatively speak the government's viewpoint on prostitution." 651 F.3d at 239. The guidelines did nothing to alter this "affirmative requirement." *Id.*

The government petitioned for rehearing, asserting again that "the affiliate guidelines vitiate[d] the compelled-speech claim" because Appellees could simply "set[] up a subsidiary organization that conforms to" the Policy Requirement and be free themselves to "remain neutral or continue advocating [their] view." JA1591. The Court denied the petition. 678 F.3d 127 (2d Cir. 2012).

D. The Supreme Court's Decision

The government sought Supreme Court review. Consistent with its treatment of Appellees' claim as primarily a facial challenge, the government acknowledged in its petition for certiorari that this Court's decision had resulted in "facial invalidation" of the Policy Requirement. U.S. Cert. Reply 5 & n.1, No. 12-10 (U.S. Dec. 21, 2012); *see also* U.S. Cert. Pet. 11, No. 12-10 (U.S. July 2, 2012) ("the Second Circuit enjoined on constitutional grounds a provision in an Act of

Congress"); *id.* at 21-22 ("That invalidation of an Act of Congress in itself warrants this Court's review.").[5] The government accordingly took the position that "further proceedings [in the district court] could not bear on the constitutional question," which was simply whether the Policy Requirement "violates the First Amendment." U.S. Cert. Reply 4; *see also* U.S. Cert. Pet. i (Question Presented).

Among its other arguments on the merits in the Supreme Court, the government advanced two independent reasons why, in its view, the affiliate guidelines eliminated any First Amendment violation. First, relying on *Rust v. Sullivan*, 500 U.S. 173 (1991), *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984), and *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983), the government contended that the guidelines would "obviate any constitutional difficulty" by allowing Appellees to accept Leadership Act funds, thus subjecting themselves to the Policy Requirement, while engaging in inconsistent speech and activities through affiliates not subject to the Policy Requirement. U.S. Br. 46, No. 12-10 (U.S. Feb. 25, 2013) (JA1732).

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[5] Appellees in fact challenged the Policy Requirement both on its face and as applied to them, but the government has consistently characterized the issue as one of facial validity, arguing, for example, that Appellees could not "prevail on their facial attack to the constitutionality of the Leadership Act if there are any circumstances under which the prohibitions of the Act are permissible." Dkt. 27, at 27 (internal quotation marks omitted); *see also* Dkt. 40, at 3 n.2 ("Contrary to Defendants' assertion, … Plaintiffs advance both facial and as-applied challenges to the pledge requirement.").

Second, the government argued that the guidelines allowed Appellees to "form affiliates whose sole purpose is receiving and administering federal HIV/AIDS funding." U.S. Br. 48 (JA1734). In other words, Appellees could forgo Leadership Act funds—and thus avoid subjecting themselves to the Policy Requirement—while accepting those funds through special-purpose affiliates that would comply with the Policy Requirement. *Id.* The government claimed that by shifting the onus of compliance to special-purpose affiliates, Appellees could "cabin the effects" of the Policy Requirement to their affiliates while remaining free themselves to express "contrary views on prostitution." *Id.* at 49 (JA1735).

In the Supreme Court, it was understood that Appellees operate globally and that the affiliates at issue were primarily foreign. Indeed, the government claimed that the Policy Requirement was necessary "[p]recisely because the conduct here is carried out in foreign areas." Oral Argument Tr. 27:13-14, No. 12-10 (U.S. Apr. 22, 2013) (JA1796); *see id.* at 15:13-15 (JA1784). "[T]he foreign context matters," the government explained, because funding recipients "are identified as working with the United States government," *id.* at 55:5, 10-11 (JA1824), and it was therefore necessary to "secure an ex ante commitment of agreement with the government's policy" to avoid the "danger that [the recipients'] views [would] be misattributed to the United States," *id.* at 27:18-20, 57:11-13 (JA1796, 1826); *see also id.* at 15:10-13 (JA1784). The government indicated that the affiliate

guidelines, which it had based on *Rust*, would achieve those purposes while allowing "flexib[ility] to account for the challenges of operating overseas," U.S. Br. 47 (JA1733), "'recognizing that circumstances in some countries may make it difficult for organizations to satisfy some of the factors demonstrating objective integrity and independence,'" *id.* at 51 (JA1737).

At oral argument, discussion focused on the difficulty of "keeping the [Policy Requirement] within its appropriate confines, and not … allowing [it] to spread." Oral Argument Tr. 17:22-23 (JA1786). Responding to Justice Breyer's concern that compelling related entities to take two inconsistent positions "would be seen as totally hypocritical," *id.* at 16:21-22 (JA1785), the government answered that the affiliate guidelines would prevent the perception of hypocrisy because the guidelines required sufficient separation between affiliates that one entity's speech would not be attributed to the other, *id.* at 22:1-11 (JA1791). Justices Ginsburg and Kennedy, however, doubted whether this solution was practicable where the required separation "in this international setting" was not merely "a simple matter of corporate reorganization," but "quite an arduous" matter of creating "a new NGO" and having it "recognized in dozens of foreign countries." *Id.* at 18:3-22 (JA1787); *see also id.* at 26:22-24 (JA1795); JA188-215 (Sidel Decl.).

With full knowledge of the global context of Appellees' work and the foreign locations of Appellees' affiliates, the Supreme Court struck down the Policy Requirement as unconstitutional, holding that "it violates the First Amendment and cannot be sustained." *AOSI*, 133 S. Ct. 2332. The Court distinguished between speech restrictions like those in *Rust*, which restrict speech within the scope of the federally funded program but leave funding recipients free to speak outside the scope of the program, and compelled-speech conditions like the Policy Requirement, which "reach outside" of the federal program. *AOSI*, 133 S. Ct. at 2330. "By demanding that funding recipients adopt—as their own—the Government's view on an issue of public concern, the condition … affects 'protected conduct outside the scope of the federally funded program.'" *Id.* (quoting *Rust*, 500 U.S. at 197). That is, "[t]he Policy Requirement compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program." *Id.* at 2332.

The Court considered and rejected the government's argument that the affiliate guidelines obviated the violation of Appellees' First Amendment rights. The government argued that the guidelines permitted Appellees either to speak freely through their affiliates while complying with the Policy Requirement themselves, or form affiliates for the sole purpose of receiving Leadership Act funds while Appellees retain the ability to speak freely. U.S. Br. 48 (JA1734).

According to the government, the latter arrangement would eliminate any burden on Appellees' First Amendment rights by "cabin[ing] the effects of [the Policy Requirement]" to its affiliates. *Id.* at 48-49 (JA1734-1735); *see also* U.S. Reply Br. 20-21, No. 12-10 (U.S. Apr. 15, 2013) (JA1763-1764).

The Court found that "[n]either approach [wa]s sufficient." 133 S. Ct. at 2331. Where the Court has relied on affiliate structures to uphold spending conditions that affect speech, it has done so only when those structures "allow an organization bound by a funding condition to exercise its First Amendment rights outside the scope of the federal program." *Id.* But under the Policy Requirement, as the Court explained, "[a]ffiliates cannot serve that purpose when the condition is that a funding recipient espouse a specific belief as its own." *Id.* The effects of the Policy Requirement by definition cannot be "cabined" to the particular entity that is forced to profess agreement with the government's position because any affiliate that is "clearly identified" with that entity can express different views "only at the price of evident hypocrisy." *Id.* at 2331. The Court drew no distinction between domestic and foreign affiliates; it struck down the Policy Requirement on its face; and it rejected the affiliate guidelines across the board. After nearly a decade of litigation, Appellees believed in 2013 that with their victory in the Supreme Court this case was finally over.

E. Permanent Injunction Proceedings

From 2013 through 2014, the government failed to implement the Supreme Court's decision in two critical respects. First, for more than a year after the Supreme Court's 2013 ruling, the government continued to issue requests for proposals (RFPs), requests for applications (RFAs), and other official communications that did not comply with the Supreme Court's decision. Specifically, the government continued to issue RFPs and RFAs for Leadership Act grants that included the Policy Requirement as a condition of funding, in some cases without making clear that Appellees are exempt from that condition—and have been since the district court entered the preliminary injunction in 2008—and in other cases without making clear that the Policy Requirement could no longer be lawfully applied to any U.S.-based organization. JA395-398 (Appellees' Oct. 30, 2014 post-hearing submission to district court); JA517-1379 (sample RFAs and RFPs provided to district court). In September 2014, after Appellees threatened further litigation, the government issued non-binding interim guidance stating that U.S.-based NGOs are not required to have a policy opposing prostitution and sex trafficking. USAID, AAPD 14-04 (Sept. 12, 2014) (JA351-374); HHS, Interim Guidance for Implementation of the Organizational Integrity of Entities Implementing Programs and Activities Under the Leadership Act, 79 Fed. Reg. 55,367 (Sept. 16, 2014) (JA375). Yet the government continued to issue RFAs and

RFPs that included the Policy Requirement without explicit, appropriate exemptions. JA382-383 (Appellees' pre-motion letter discussing RFAs and RFPs issued after government's September 2014 guidance).

Second, the government continued to apply the Policy Requirement to all foreign organizations—even the clearly identified affiliates of Appellees—as it interpreted the Supreme Court's decision narrowly to exempt only U.S.-based NGOs. The September 2014 guidance stated that the Policy Requirement "remains valid" as to "foreign affiliates" of U.S. NGOs, "unless exempted by … the implementing regulations" requiring separation between the funding recipient and any affiliate that engages in activities inconsistent with a policy against prostitution, JA373, 375, and reiterated that such separation was necessary to prevent the public from "attribut[ing]" the affiliate's views "to the recipient and thus to the Government," JA373.

In light of the government's failure to comply with the Supreme Court's decision, Appellees sought a permanent injunction restraining the government from (1) issuing communications that contain the Policy Requirement with no exemption for Appellees and their affiliates, and (2) applying the Policy Requirement to "foreign affiliates that are 'clearly identified' with" Appellees by, among other things, their "share[d] … name, brand, and mission." JA376-378 (Appellees' letter noticing intent to move for permanent injunction). The district

court received letter briefing from the parties, held a hearing, and requested supplementary submissions and declarations. *See* JA376-2063 (letter briefs, hearing transcript, and post-hearing submissions).

In January 2015, the district court agreed with Appellees' interpretation of the Supreme Court's decision, found the government in violation of that decision, and granted the permanent injunction to bring an end to ongoing violations of Appellees' First Amendment rights. SPA1-16. Although the government conceded that its RFPs and RFAs referencing the Policy Requirement "should make clear that [Appellees] are exempt," the district court found "numerous examples of RFPs and RFAs that the Agencies created and issued after the Supreme Court's decision" without "any exemption." SPA4-5. And the court noted other communications that similarly contained no exemption and that chilled Appellees from applying for federal funds. SPA12-13.

The district court further held that the Supreme Court's decision foreclosed the government's bid to exclude Appellees' foreign affiliates from the permanent injunction. The court relied, in particular, on the Supreme Court's holding that Appellees' First Amendment rights are violated when they must "either comply with the Policy Requirement" themselves "or face 'the price of evident hypocrisy' by taking a stance differing from" their affiliates. SPA9 (quoting *AOSI*, 133 S. Ct. at 2331). Under that reasoning, "whether the affiliate is foreign … has no bearing

on whether the domestic NGO's rights would be violated by expressing contrary positions on the same matter through its different organizational components." *Id.* As the court explained:

> The [foreign or domestic] nature of the affiliate is not relevant because it is not any right held by the affiliate that the Supreme Court's decision protects. Rather, it is the *domestic NGO's* constitutional right that the Court found is violated when the Government forces it to choose between forced speech and paying "the price of evident hypocrisy." That constitutional violation is the same regardless of the nature of the affiliate.

SPA9-10 (emphasis in original). The court thus found irreparable harm and actual success on the merits warranting a permanent injunction because "enforcing the Policy Requirement against a domestic NGO or its affiliates violates the First Amendment rights of the domestic NGO." SPA15. And because the court "fores[aw] no constitutional application of the Policy Requirement as to domestic NGOs or their affiliates," the district court further ordered the government to show cause why it could apply the Policy Requirement to any class of recipients of Leadership Act funds. SPA14, 16.

The government appealed, and for approximately two years, Appellees agreed to several stays of the injunction and appeal to facilitate negotiation of what Appellees hoped would be a comprehensive settlement to protect their First Amendment rights and finally bring an end to this matter. But in January 2017, with an agreement close at hand, the government abruptly broke off negotiations

and moved for reconsideration or clarification of the permanent injunction. The district court denied the motion and lifted the stay of the injunction. SPA17-30.

In denying reconsideration, the district court noted that the government had presented no "new facts, evidence, or intervening legal authority," but instead merely "repeat[ed] almost identically" its prior objections to the scope of the injunction. SPA25. And it noted that the government has "to date failed to respond" to the order to show cause. SPA29.[6] The district court likewise rejected the government's argument that the injunction was insufficiently clear or definite. The court found that the class of affiliates covered by the injunction would likely be "limited and ascertainable" in light of the plain and ordinary meaning of the word "affiliate," and further noted Appellees' "reasonable suggestion to develop clarifying language" in the event the government required additional guidance. SPA27. In opposing the government's motion, Appellees had stated that "[w]hile the injunction as written is sufficiently clear and specific to take immediate effect, [they] would have no objection to the … addition of language explaining that 'clearly identified' foreign affiliates are those that share the same name, trademark,

[6] The district court held no further proceedings with respect to the order to show cause. Although the government has objected to the order, it did not appeal on that issue and could not do so because it is not a final appealable order. *Pu v. Russell Publ'g Grp., Ltd.*, 683 F. App'x 96, 98 (2d Cir. 2017) ("[A]n order to show cause is not an appealable final order, and we therefore lack jurisdiction to review it." (citing *Weitzman v. Stein*, 897 F.2d 653, 657 (2d Cir. 1990))).

and public branding (e.g., corporate logo) as Plaintiffs." Dkt. 162, at 7. The court directed the parties to meet and confer on that issue. *Id.*[7]

The government instead filed the instant appeal, seeking an immediate stay of the permanent injunction and of further proceedings in the district court. This Court granted a stay of the injunction "insofar as it enjoins Appellants from enforcing" the Policy Requirement against foreign NGOs, "including Appellees' foreign affiliates." Mot. Order, No. 15-974 (2d Cir. July 25, 2017).

SUMMARY OF ARGUMENT

The Supreme Court held that the Policy Requirement "violates the First Amendment and cannot be sustained" because it "compels … the affirmation of a belief that by its nature cannot by confined within the scope of the government program." *AOSI*, 133 S. Ct. at 2332. In implementing that decision, the district court correctly held that applying this compelled-speech condition to Appellees' clearly identified affiliates harms the First Amendment rights of Appellees themselves. It therefore properly enjoined the government from enforcing the Policy Requirement against Appellees and their affiliates, whether foreign or domestic.

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[7] In response to the district court's order, the parties conferred regarding a more detailed definition of "affiliate." After this Court granted the government's motion for a partial stay of the permanent injunction, the government opted to discontinue those discussions.

I. The scope of the permanent injunction follows directly from the Supreme Court's decision, and was necessary to afford Appellees full relief for the constitutional violation the Supreme Court found. In striking down the Policy Requirement, the Supreme Court distinguished between restrictions like the one upheld in *Rust v. Sullivan*, 500 U.S. 173 (1991), which limit a funding recipient's speech within the federal program, and compelled-speech conditions like the Policy Requirement, which "reach outside" of the federal program. *AOSI*, 133 S. Ct. at 2330. The government argued that the affiliate regulations averted any compelled-speech problem because Appellees could establish special-purpose affiliates to receive Leadership Act funds—and thus comply with the Policy Requirement—leaving Appellees free to remain neutral or express contrary views. The Supreme Court rejected that argument. The Court held that because it requires a funding recipient to adopt the government's view as the recipient's own, the Policy Requirement implicates the organization's speech not only in its federally funded activities but in all of its privately funded activities through various organizational components, thereby preventing the organization from taking no view or a different view on its "own time and dime." *Id.* That constitutional infirmity persists regardless of whether the condition is imposed on Appellees directly or on special-purpose affiliates set up to receive and administer federal funding. Even if the affiliate is the one required to espouse the government's view,

Appellees that are "clearly identified" with the affiliate can express a different view "only at the price of evident hypocrisy." *Id.* at 2331.

The government now makes the same arguments all over again, suggesting that the Supreme Court's holding should be confined to the domestic context, but as the Supreme Court itself recognized and as the record makes clear, this case is focused on the context overseas, where Appellees and their affiliates operate in the global fight against HIV/AIDS. As the district court correctly held, the Supreme Court's decision was not limited to the domestic context and did not turn on the affiliates' place of incorporation; rather, it focused on whether affiliates are clearly identified with Appellees. Because the violation of Appellees' rights remains even when the affiliate alone is subject to the Policy Requirement, the injunction properly extends to affiliates—foreign and domestic—in order to fully redress the constitutional violation found by the Supreme Court.

The government's arguments to the contrary are foreclosed by the Supreme Court's decision and are otherwise meritless. It is no answer to the harm to Appellees' First Amendment rights that the foreign affiliates lack First Amendment rights of their own. And the Supreme Court reached its conclusion fully cognizant of, and focused on, the foreign context in which Appellees and their worldwide networks of affiliates operate. The government questions whether constitutional harm truly arises from the risk of misattribution, but the Supreme

Court already held that it does. An injunction limited to Appellees would leave that harm unaddressed.

II. There is nothing unclear about the injunction and nothing more need be said to apprise the government of the conduct prohibited. The term "affiliate" is clear and definite. The district court's explanation of that term is plain and easy to understand. The record has likewise been clear for years about the identity of Appellees and their co-branded affiliates. And the government has had numerous opportunities to gain additional clarity. In fact, Appellees offered additional clarifying language to further define the term "affiliate"—an offer the government declined even after the district court ordered the parties to meet and confer. The government's alternative suggestion that there was some sort of impropriety in the procedure by which the district court issued the injunction is equally meritless. Notwithstanding that these issues were already argued before the Supreme Court, the district court still entertained multiple rounds of extensive letter briefing, replete with exhibits, oral argument, and a fully briefed reconsideration motion. The government cites no prejudice and nowhere explains what more the district court should have done. Nor does the government point to any actual confusion that would hinder compliance.

The government should be made to comply with the Supreme Court's decision and the permanent injunction seeking to enforce it.

ARGUMENT

"The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). "A district court has a wide range of discretion in framing an injunction in terms it deems reasonable to prevent wrongful conduct, and appellate review of the terms of the injunction must focus upon whether there has been an abuse of that discretion." *Springs Mills, Inc. v. Ultracashmere House, Ltd.*, 724 F.2d 352, 355 (2d Cir. 1983) (citation omitted); *see Patsy's Italian Rest., Inc. v. Banas*, 658 F.3d 254, 273 (2d Cir. 2011) (recognizing "district court's great flexibility in fashioning relief"). The government has shown no abuse of discretion here.

I. THE DISTRICT COURT PROPERLY ENJOINED THE GOVERNMENT FROM IMPOSING THE POLICY REQUIREMENT ON APPELLEES' FOREIGN AFFILIATES

A. The Injunction Follows Directly From The Supreme Court's Decision

The Supreme Court held that the Policy Requirement "violates the First Amendment and cannot be sustained." *AOSI*, 133 S. Ct. at 2332. Given Appellees' showing of "(1) irreparable harm (here, a constitutional violation) and (2) actual success on the merits," *Ognibene v. Parkes*, 671 F.3d 174, 182 (2d Cir. 2011), the district court appropriately enjoined enforcement of the Policy Requirement "to afford complete relief" for the violation of Appellees' First

Amendment rights, *Seibert v. Sperry Rand Corp.*, 586 F.2d 949, 951 (2d Cir. 1978); SPA15.

That injunction appropriately extends to Appellees' affiliates—regardless of where those affiliates happen to be incorporated—because the Supreme Court found that the Policy Requirement "compels … the affirmation of a belief that by its nature cannot by confined within the scope of the government program." *AOSI*, 133 S. Ct. at 2332. In reaching that holding, the Court distinguished between conditions that affirmatively compel speech and speech restrictions that merely limit what a grantee can say or do with federal funds. Funding conditions that restrict the recipient's speech within the scope of the federally funded program are generally lawful, the Court explained, so long as they leave the recipient "'unfettered in its other activities.'" *Id.* at 2330 (quoting *Rust v. Sullivan*, 500 U.S. 173, 196 (1991)).

In *Rust*, for example, the Court upheld a condition on federal funding under Title X of the Public Health Service Act that "barred [federally funded] projects from advocating abortion …, and required grantees to ensure that their [funded] projects were physically and financially separate from their other projects that engaged in the prohibited activities." *AOSI*, 133 S. Ct. at 2329 (quoting *Rust*, 500 U.S. at 180-181 (internal quotation marks omitted)). The key distinction illuminated by *Rust*, the Court explained in this case, is that while "Congress can

… selectively fund certain programs," it cannot bar grantees from "'engaging in … protected conduct outside the scope of the federally funded program.'" *Id.* at 2329-2330 (quoting *Rust*, 500 U.S. at 197); *see also Rust*, 500 U.S. at 197 ("[O]ur 'unconstitutional conditions' cases involve situations in which the Government has placed a condition on the recipient of the subsidy rather than on a particular program or service."). The condition in *Rust* satisfied that standard because it "governed only the scope of the grantee's Title X projects" and "did not 'prohibit[] the recipient from engaging in … protected conduct outside the scope of the federally funded program.'" *AOSI*, 133 S. Ct. at 2330 (quoting *Rust*, 500 U.S. at 197); *see also Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 545 (1983).

A compelled speech condition like the Policy Requirement, in contrast, cannot be confined within the scope of the federal program. "[R]equiring recipients to profess a specific belief" necessarily crosses the line described in *Rust* because it involves the compelled adoption of a viewpoint by an organization, not a mere program-based restriction. *AOSI*, 133 S. Ct. at 2331; *see also Rust*, 500 U.S. at 197 (government cannot impose "a condition on the *recipient* of the subsidy rather than on a particular program or service"). Once an organization is forced to adopt the government's viewpoint, its freedom to speak on the subject is compromised for all purposes:

> By demanding that funding recipients adopt—as their own—the government's view on an issue of public concern, the condition by its very nature affects "protected conduct outside the scope of the federally funded program." A recipient cannot avow the belief dictated by the Policy Requirement when spending Leadership Act funds, and then turn around and assert a contrary belief, or claim neutrality, when participating in activities on its own time and dime. By requiring recipients to profess a specific belief, the Policy Requirement goes beyond defining the limits of the federally funded program to defining the recipient.

Id. at 2330 (quoting *Rust*, 500 U.S. at 197).

In reaching that holding, the Supreme Court rejected the core argument the government makes again here. As discussed, the government argued before the Supreme Court, as it does here, that its proposed imposition of the Policy Requirement on affiliates avoids any constitutional problems because the affiliate guidelines "'cabin[] the effects' of the Policy Requirement within the scope of the federal program," leaving Appellees themselves free to express views contrary to the government's or to remain neutral. *AOSI*, 133 S. Ct. at 2331 (quoting U.S. Br. 49 (JA1735)).

The Supreme Court disagreed. It recognized that while an affiliate structure might eliminate a First Amendment violation in a *Rust*-type case, where the speech restriction is limited to a particular program and an organization can "exercise its First Amendment rights outside the scope of th[at] program" by speaking through its affiliates, a compelled-speech condition like the Policy Requirement "by its nature" cannot be confined to the particular affiliate that is forced to comply with

the Policy Requirement. *AOSI*, 133 S. Ct. at 2331-2332. Any speech by an affiliate clearly identified with an Appellee is too readily attributed or imputed to the Appellee and thus violates the Appellees' First Amendment rights. As the Court explained, "[a]ffiliates cannot" solve a First Amendment problem "when the condition is that a funding recipient espouse a specific belief as its own"—at least where, as here, the affiliated entities are "clearly identified" with one another. *Id.* Rather, just as the effects of forced speech cannot be confined to a particular government program, so too they cannot be confined to one entity in a network of "clearly identified" affiliated entities. Compelling one affiliate to affirm its belief in the government's viewpoint impinges on the speech of the entire network because affiliated entities that are clearly identified with one another, even if not directly subject to the Policy Requirement themselves, can express views contrary to the government's "only at the price of evident hypocrisy." *Id.* at 2331.

As the district court recognized, nothing in the Supreme Court's reasoning turned on where a particular affiliate happens to be incorporated. SPA9-10. The record before the Supreme Court also made plain that Appellees' affiliates were primarily foreign—a point the Justices specifically acknowledged at oral argument. *Supra* pp. 21-23. But the Court's opinion drew no distinction between foreign and domestic affiliates. Nor would such a distinction have made sense, as the Court

was focused on the Policy Requirement's violation of Appellees' First Amendment rights, not the rights of their affiliates. *See AOSI*, 133 S. Ct. at 2331.

The Supreme Court has thus already held that imposing the Policy Requirement on Appellees' "clearly identified" affiliates would not—contrary to the government's contention here (at 27-28)—leave Appellees free to speak however they choose or to remain neutral when acting outside the scope of their federally funded activities. The government made that argument and lost, for reasons the Supreme Court carefully explained. And there is no real dispute here that each Appellee is "clearly identified" with its respective affiliates. Appellants have never challenged that contention. Nor could they. Each Appellee shares a common name, brand, and logo with its affiliates; each speaks with one voice and works together toward a common mission with its affiliates; each is governed by the same common set of rules as its affiliates; and each is connected to its affiliates by a larger corporate structure. *See supra* pp. 8-12. As the record reflects, imposing the Policy Requirement on those clearly identified affiliates—wherever they happen to be legally incorporated—would violate Appellees' First Amendment rights in precisely the manner identified by the Court. For example, if CARE India is compelled to "avow[] the belief dictated by the Policy Requirement," CARE USA cannot "turn around and assert a contrary belief, or claim neutrality," without paying "the price of evident hypocrisy." *AOSI*, 133 S.